SUPREME COURT, U. S.

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IN THE

# Supreme Court of the United States

October Term 1969

No. [redacted] 588

FLORIDA CITRUS EXPOSITION, INC.
also known as
FLORIDA CITRUS SHOWCASE INC.,
*Petitioner and*
*Cross-Respondent,*

vs.

HUNGERFORD CONSTRUCTION COMPANY
a Michigan Corporation; and
CONTINENTAL CASUALTY COMPANY
an Illinois Corporation,
*Respondents and*
*Cross-Petitioners.*

## CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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October Term 1969

NO. 510

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also known as
FLORIDA CITRUS SHOWCASE INC.,

*Petitioner and*
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vs.

HUNGERFORD CONSTRUCTION COMPANY
a Michigan Corporation; and
CONTINENTAL CASUALTY COMPANY
an Illinois Corporation,

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## CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Cross-Petitioners and respondent respectfully pray that this court grant this cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on April 22, 1969.*

*Respondents and Cross-Petitioners will use the same references used in the Petition for Writ of Certiorari and reply thereto:
"R____" refers to certified Transcript of Appendix used in the lower court.
"ST____" refers to certified Supplemented Transcript which contains all testimony except exhibits.
"A____" refers to Appendix to petition.
Petitioner and Cross-Respondent will be referred to as "Owner"; Respondents and Cross-Petitioner will be referred to collectively as "Contractor".

## CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 410 F.2d 1229.

## QUESTION PRESENTED FOR REVIEW

WHETHER THE DECISION OF THE LOWER COURT IN A DIVERSITY CASE WHICH HELD EVIDENCE OF THE CAUSE OF DAMAGE AND THE AMOUNT OF DAMAGE BASED ON ESTIMATES AND APPROXIMATIONS AND INCLUDING INSEPARABLE AMOUNTS NOT ATTRIBUTABLE TO CONTRACTOR IS IN CONFLICT WITH APPLICABLE LAW OF THE STATE OF FLORIDA.

## JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on April 22, 1969 and Issued as Mandate on July 10, 1969. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

## STATEMENT OF THE CASE

The statement of this case appears in the petition filed by the Owner and as corrected in the brief of Contractor. Only such additional statement as is necessary on this cross-petition will be set forth herein.

The damages the Owner sought to prove in this case were in two areas only: 1) damages to remedy leaking of water through a concrete roof in the shape of a dome and 2) damages to acoustical plaster on the undersurface of the concrete roof. (R 123, 124) (ST 975, 976)

On the issue of the certainty of the cause and the responsibility for the leaking of water through the concrete, the following evidence is considered material to cross-petition. There was no waterproof covering designed to go over the concrete roof. (R 57, 59; ST 311, 333) It was anticipated by the design engineer that the concrete forming the roof might crack. (R 90-91; ST 707-708) Cracks would allow water to pass through. (R 55; ST 139) Finally, the concrete mix for the roof contained 48.6% expanded shale called Holite which is a porous coarse aggregate included in the concrete which formed the roof. (R 103, 109, 118, 180, 183; ST 758, 895-904)

Additionally, on the issue as to the certainty of the cause of damages an inseparable amount of the Owner's damages were the result of numerous blisters that appeared in a neoprene hypalon covering placed over the dome by a contractor, Nationwide Painting Company, hired by the Owner after Contractor had left the site and this litigation had commenced. Nationwide improperly applied the covering. The blisters had to be removed by cutting them out and the spots left patched with flashing cement. (R 79-80, 107; ST 462-463, 811) These blisters were not the responsibility or fault of the Contractor.

The evidence submitted by the Owner included some unascertained amount for the removal of the blisters and the patching. It was possible to separate these damages for removal and patching of blisters, however, the witness making the estimate for the Owner had not made a sufficient enough study to indicate what portion of the total damages were related to the removal of the blisters caused by Nationwide Painting Company. (R 108; ST 835)

On the question as to the certainty of damages, the following evidence is considered material to this cross-petition. The evidence as to the amount necessary to cover the dome to prevent leaking was "in the vicinity, approximately of a dollar a square foot." (R 105-106; ST 801) Also, as mentioned above, the total amount of damages designed to correct the leaking of water through the dome contained an inseparable amount attributed to defective work performed by Nationwide Painting Co.

The evidence as to the amount necessary to correct the damages to the acoustical plaster on the undersurface of the roof was based on an estimate made by a man looking at the ceiling from the ground with a pair of field glasses (R 93-94; ST 737-738), although a determination as to whether all the acoustical plaster had to be removed or whether some could remain could not be made without a close inspection. (R 95; ST 740) The dollar amount of the estimate was "somewhere in the neighborhood of $3.50 to $4.00 a yard to apply." (R 97; ST 742) In addition, the estimate given and the damages awarded included an amount for removal of all the existing acoustical plaster. As to the dollar amount required for removal, the estimator first said he would not give a definite quote because it was an unknown factor. (R 98; ST 742) Later, the estimator indicated an estimate of $2.00 a yard to remove. (R 99; ST 742) No bids were obtained by the witness for a basis for his estimate. (R 100; ST 753)

The lower court found without reciting the evidence it was relying on that the evidence was adequate to support the verdict. (A 18)

## REASONS FOR GRANTING THE WRIT

1. **The decision of the lower court in finding the proof adequate as to the cause and amount of damages conflicts with the applicable law of the State of Florida.**

The dome roof contained cold joints which were caused to appear by the Contractor in the pouring of the concrete. These could or could not allow water to pass through. (ST 143) There is no evidence to show that the leaking complained of is solely related to these cold joints. In addition, there are three other sources of leaking which would not be attributable to the Contractor: 1) anticipated cracks in the concrete; 2) the concrete was porous; 3) there was no waterproof covering designed or required to cover the concrete.

The applicable law of the State of Florida is set forth in the case of *Equitable Fire & Marine Insurance Co. v. Tiernan Building Corporation* (Fla. App. 1966), 190 So.2d 197, which case cites opinions of the Supreme Court of Florida. That case reversed a judgment in favor of an owner against a contractor because there was no evidence as to the cause of a leak in a roof and additionally because the proof of damages was based on a formula and there was no proof the expense was waived. The facts are similar to the present case.

Contractor maintains that the proof in the *Tiernan case,* supra, was in excess of that in the present case, but was insufficient according to the law of Florida to justify an award of damages and therefore decision of the lower court in this case conflicts with law of Florida as set forth in that case.

In the case of *Tolin Manufacturing Corp. v. Roy Feiner Handbags, Inc.*, 173 So.2d 714 (Fla. App. 1965), the court reversed a jury verdict awarding damages for a breach of contract because the testimony as to damages consisted entirely of approximations and estimates. In reaching this decision, the court cited decisions of the Supreme Court of Florida.

In the present case, all of the evidence is based on "approximations and estimates" and there is no certainty as to either of the estimates.

The Fifth Circuit Court of Appeals has recently required a new trial on the issue of damages applying Florida law in a diversity action. *Center Chemical Company v. Avril, Inc.*, 392 F.2d 289 (5 Cir. 1968). The court said:

> ". . . There can be no recovery under Florida law where the evidence is not sufficient to enable the jury to assess damages with a reasonable degree of certainty without leaving the amount awarded to speculation and conjecture . . ."

392 F.2d at page 290.

In the present case, the evidence was so lacking that the jury had to speculate as to the amount to be deducted from the estimate for covering the dome for removal of blisters and patching the holes left by the removal. The jury had to speculate as to whether all of the acoustical plaster had to be removed. Also the jury had to speculate as to the cause of the leaking. Because of these deficiencies in the proof the jury verdict could only be based on speculation and conjecture and the judgment of the trial court should have been reversed.

It has also been declared by the Supreme Court of Florida that the evidence must provide a predicate on which a definite sum of damages can be awarded. *Florida Ventilated Awning Co. v. Dickson,* 67 So.2d 215 (Fla. 1953). No such predicate exists in this case. Each estimate relied upon by the Owner as its only evidence as to the amount of damages contains indefinite sums.

The following facts render the amount and cause of damages uncertain:

1) The damages awarded include some amount for removal and patching of blisters in the material applied by Nationwide Painting Company; which sum is capable of determination but was not so determined by the owner.

2) The figure of $1.00 per square foot to cover the dome based on an approximate estimate.

3) The estimate of $5.50 per square yard for removal and replacement of acoustical plaster includes the sum of $2.00 per square yard. which is an unknown factor, which the estimator said he could not quote definitely, and an indefinite sum in the neighborhood of $3.50 to $4.00 for new plaster.

4) There was no showing that all of the acoustical plaster had to be removed.

5) The cause of the leaking is uncertain.

The inclusion of an amount of money to remedy a defect which was caused by Nationwide Painting Company alone renders the cause and the amount of dam-

age so uncertain as to require reversal of the judgment of the trial court and reversal of that portion of the judgment of the lower court affirming the trial court. The damages necessary to remedy the leaking and the damages necessary to remedy the blisters can be separated. The judgment of the lower court conflicts with the applicable law of the state of Florida and this court should exercise its discretion and grant certiorari. *Ruhlin v. New York Life Insurance Co.* (1938), 304 U.S. 202; 58 S.Ct. 860, 82 L.Ed. 1290.

## CONCLUSION

Based on the foregoing authorities, this petition for a writ of certiorari to the Fifth Circuit Court of Appeals should be granted.

Respectfully submitted,

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## PROOF OF SERVICE

I, ANTHONY S. BATTAGLIA, one of the attorneys for Respondents and Cross-Petitioners, HUNGERFORD CONSTRUCTION COMPANY and CONTINENTAL CASUALTY COMPANY, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of September, 1969, I served a copy of the foregoing Brief of Respondents and Cross-Petitioners on the petitioner and cross-respondent by mailing a copy in a duly addressed envelope, postage prepaid, to its respective attorneys of record as follows: J. A. McClain, Jr., Esquire, of the firm of McCLAIN, TURBIVILLE & HELLER, 615 Marine Bank Building, Tampa, Florida, and to J. Hal Connor, Esquire, of the firm of SUMMERLIN, CONNOR & THREADGILL, P. O. Box 793, Winter Haven, Florida.

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